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The Essence of Constitutional Rights

Czech Republic

The Constitutional Activism, or the Constitutional Self-Restraint?
Examples from the Czech Republic

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1. Introduction

Any model or concept of constitutional review faces the dilemma between the constitutional activism and the constitutional self-restraint. The dilemma deals with the principal question where is the final point the boundaries of the constitutional review may extend to; it occurs irrespective of particular competences of relevant the constitutional court, i.e. irrespective of the fact the court is formally considered strong or weak in its formal powers. Such question is however very delicate, because it is the constitutional court itself that interprets the constitutional principles including the principle of separation of powers. Therefore, the constitutional court can be permanently blamed for violating the separation of powers while using its own competences.

It is obvious that in such models of constitutional review that have been created as a direct reaction to the massive infringements of human rights by the former totalitarian regimes (the Federal Republic of Germany after WWII, Spain after the dictatorship of Franco, and the whole group of CEECs after the collapse of their communist regimes), the constitutional courts tend to be more activistic. The totalitarian experience and the abuse of power often lead to the scepticism relative to the principle of majority represented by the strong political parties, parliamentary majorities and „their“ governments. There usually exist in these countries a conviction according to which the principle of majority (the expression of the „Rousseauian volonté général“) has to be supplemented by other constitutional principles including the principle of justice and the rule of law. In other words, the principle of majority does not guarantee that its outcomes are generally just (fair). Therefore, there is a strong tendency to supplement the principles of parliamentary democracy by other means of reaching the rule of law in these countries. This tendency is usually
reflected by the particular efforts of the constitutional courts in their constitutional review to become more activistic, especially in the first periods after the transition towards democracy.

The Constitutional Court of the Czech Republic as a constitutional court founded in the initial period of the democratic transition could not avoid this tendency as well. Therefore, we will explore and demonstrate such general tendency of the Czech constitutional jurisprudence on the following decisions that show where the constitutional court set the boundary between its own competencies and the position of the parliament (decision No. Pl. ÚS 20/05) and general jurisprudence of the ordinary courts (decision No. I. ÚS 546/03).

The Czech constitutional court created after the split of the former Czechoslovak federation in 1993 represents a typical example of modern constitutional courts inspired by the position of the Federal Constitutional Court of the Federal Republic of Germany (*Bundesverfassungsgerichtshof*) founded after WWII (although the Czechoslovak tradition of the constitutional review is older going back to the interwar period - the early 1920s, the nowadays constitutional court rather follows the models of constitutional review invented after WWII).

The constitutional court has, therefore, huge competences covering the abstract and the concrete constitutional review, the procedure on individual constitutional complaints, the *a priori* constitutional review of international treaties, the procedure on conflict of the competences, the impeachment of the president etc.

It could be mentioned that – similarly – as the position and functions of the court were inspired by the German constitutional court, there is a distinguishable impact of the German courts’s jurisprudence on the case-law of the Czech constitutional court as well (for example the decisions on the positions and functions of political parties, the decisions on electoral law, and recently the judgement on the relationship between the domestic constitutional law and the EC law inspired by the *Solange II doctrine* – decision No. Pl. ÚS 50/04).

Although the court could be considered as a strong one and has quite a stable authority within a public there are also decisions that have not been respected in the first decade of its existence. The dispute between the Constitutional court and the supreme court concerning the interpretation of the old communist law led even to the situation called „the war of courts“. The Czech parliament has not respected some of the court’s decisions as well. E. g. in the decision No. Pl. ÚS 53/2000 on financing of political parties the constitutional court stipulated that the increase of the contribution for an individual parliamentary seat to 1.000.000 CZK finds itself unconstitutional, since it infringes the principle of proportionality and equal political representation and damages the
non-parliamentary political parties. The parliament passed a new law and decreased it ostentatiously to 900,000 CZK. Another example could be observed in the court’s decisions on the unconstitutional regulation of apartment rents that will be commented in greater detail later.

2. The Activism of the Constitutional Court of the Czech Republic towards the Czech legislator: the Constitutional Activism in the Cases of Legislator’s Inactivity

In the decision Pl. ÚS 20/05 of 28th February 2006 the constitutional court dealt with the loophole in the law as a result of Parliament’s inactivity. It came to the conclusion it has to be redressed through the interpretation conforming to the protection of human rights.

The procedure before the Constitutional Court was launched on the basis of the proposal of the Municipal Court in Prague that had been solving a civil dispute between a lessor and a lessee over the amount that equals the difference between the regulated rent, that the lessee was obliged to pay under the Price Decree of Ministry of Finance of 2002, and the so-called "locally regular" (usual) rent. The Municipal Court came within the civil litigation to the conclusion that the legal regulation of contract of apartment lease contradicts the Czech constitution. Therefore the court submitted the case according to art. 95 par. 2 of the Constitution to the Constitutional Court.

The Municipal Court presented two arguments. (1.) The present-day regulation is not balanced, since the provisions aiming at the protection of the lessor’s rights (provisions of a separate and special law enabling the lessor to unilaterally raise the rent that are presumed by par. 696 of the Civil Code) are absent, whereas the provisions that markedly protect the lessee (such as the contract of lease made for an indefinite period of time, the possibility to give a notice only on the basis of limited reasons deriving from the law and with a court’s consent) are simultaneously valid. This situation favours the lessee. (2.) The unconstitutional situation itself is given by the loophole in the law consisting in the fact that the Parliament - despite the previous appeals of the Constitutional Court - had not passed the regulation presumed in par. 696/1 of the Civil Code.

The Constitutional Court annulled the legal regulation dealing with the regulation of rents for several times in the past (decisions No. Pl. ÚS 3/2000 of 21st June 2000, Pl. ÚS 8/02 of 20th November 2002 and Pl. ÚS 2/03 of 19th March 2003). The main reason was the fact that the regulation had not complied with the principle of proportionality, i.e. that the limitations of the ownership had not respected the requirement of just balance between the public interests and the protection of human rights. According to the Constitutional Court the state is proscribed to transfer its economic and social policies in the sphere of housing to private owners. The state is not allowed to transfer the social functions of housing that is the role of modern welfare state to private owners.
through regulation of the low prices for housing (rents) imposed upon the owners who are forced to hold such burden from their own resources.

The Constitutional Court came to the conclusion that the wording of the contested provision in par. 696/1 itself is not unconstitutional. However, what is considered unconstitutional is the long-lasting Parliament inactivity that has resulted in unacceptable inequality between various categories of lessors and lessees. The absence of such a legal regulation, thus the existing loophole in the law, represents an unconstitutional situation that deeply contradicts the Charter of Fundamental Rights and Freedoms if only for the reason that the inactivity prolongs the discrimination - already criticised by the Constitutional Court - between some lessors who are allowed to lease their apartments for a regular (market-derived) price (rent) and the other lessors that are forced to lease their flats for a regulated price (rent) that reaches only the maximum amount determined by the state in the last legal regulation annulled by the Constitutional Court in the previous decision.

The Constitutional Court added that under such circumstances it cannot restrain itself from being only a “negative law giver” and must – while respecting the balance of separate state powers – create the space for the protection of fundamental rights (“... the chosen judicial way of solving this social problem reflects the relation between the legislative and judicial power. If one of the separate powers trespasses on its constitutional delimitation and competences or on the contrary does not meet its goals and prevents the other parts of state power from their functioning, the mechanisms of checks and balances has to occur.”). The Constitutional Court therefore called upon the judiciary in the Czech Republic to redress the gap by interpretation which conforms to the constitution and protection of fundamental rights, i.e. to decide and adjudicate the rents at the amount corresponding to the local conditions and eliminating the discrimination.

3. The Activism of the Constitutional Court of the Czech Republic towards the General Jurisprudence of Ordinary Courts: the Constitutional Activism in Inventing “New” and “Non-recognized“ Fundamental Rights

There are a lot of decisions of the Czech constitutional court in which the court dealt with the essence of fundamental rights and declared them to be subjective public rights affecting the relation between an individual and the state. The constitutional court deduced such a characteristic of fundamental rights from the explicit expressions contained in the Czech Constitutional Order (which involves not only the Constitution itself, but also other constitutional laws and the so called Charter of Fundamental Rights and Freedoms). In this respect the constitutional court „only“ followed the text of the Charter of Fundamental Rights and Freedoms.
However, there is a sole decision in which the constitutional court expressed a great degree of activism while formulating a „new“ right that had not been recognized and guaranteed in the constitutional text explicitly. What is more, the constitutional court used this activistic and natural-legal approach despite the fact the Czech constitution has no provision that would stipulate that beside those rights guaranteed in the Constitution there shall be other – explicitly unexpressed – rights, as some constitutions (e. g. the constitutions of some Central and South American states such as Mexico or Guatemala) do either. The constitutional court declared in the decision in question the existence of the right to autonomous will of an individual as a result of an „inventive interpretation“ of one particular provision of the constitution combined with an application of liberal concept (or idea) of the essence and evolution of fundamental rights.

The relevant case was based on the constitutional complaint of a private company whose lawsuit had been denied by an ordinary court for the absence of its jurisdiction (there is a special provision in the Czech law on the civil procedure that allows the contracting parties to alter the general provisions on the jurisdiction of the ordinary court and to opt for another court authorized this way to hold the case - the so-called prorogation clause in the private agreement). Although the contracting parties had prorogated the jurisdiction of the respective ordinary court, this court denied its jurisdiction and referred the plaintiff to another court.

As the ordinary court denied to recognize the legal consequences the parties intended while contracting the prorogation clause in the agreement, the constitutional court probably could base its review of the court’s decision in respect to the right to fair trial (or to the right to court respectively). However, the constitutional court chose another way and tried to formulate the right to autonomous will which had been infringed – according to the constitutional court – by the fact that the ordinary court ignored the clause on the prorogation of jurisdiction.

The constitutional court used as a basis for such a formulation a provision of art. 2 para. 3 of the Charter of Fundamental Rights and Freedoms that stipulates that „everyone is allowed to do that which is not prohibited by a law“. The constitutional court held that this provision has to be interpreted in the way it provides an autonomous and free space for an individual for his/her individual conduct; and simultaneously it is not only an objective principle for a legislator. The court declared that the free sphere of an individual and its direct constitutional guarantee in the form of an enforceable right express the priority of an individual before the state power realised in particular statutes (laws). Otherwise, this sphere could be eroded and narrowed by the activities of an „ordinary“ legislator (the court touched in this way the very essence of fundamental rights – their priority before the state power realised by legislative activities of parliaments and executive bodies).
However, the constitutional court went even further in its argumentation and declared that: „the individual’s right to the respect for his/her autonomous and free sphere actually operates as a constant placed before the bracket in which are found particular specified fundamental rights put into positive law as a reaction to the massive infringement of them by authoritarian or totalitarian regimes. The need to formulate particular fundamental rights has, as a historical matter, always been conditioned as a reaction to the massive infringement in a certain field of individual freedom, from which specific, positively formulated rights, emerged“. 

According to the opinion of the constitutional court there is - beyond the particular fundamental rights formulated positively in the constitution - a space of individual liberty in which other rights that have not been positively recognized by the state so far can be formulated as a reaction to a certain conduct of the state power that penetrated somehow the general sphere of liberty (it has to be admitted that this idea is actually an adoption of liberal theory of human rights presented by F. A. von Hayek in his work Law, Legislation and Liberty).

Those fundamental rights that have been already recognized and create a catalogue of fundamental rights guaranteed emerged originally in reaction to the previous conducts of the state power that “typically” infringed the autonomous sphere of individuals. The formulation of such rights does not exclude the possibility to formulate new fundamental rights in the same way (this fact is apparent according to the constitutional court from the evolution of particular catalogues of fundamental rights). The infringement of the autonomous sphere of an individual’s liberty, therefore, creates the necessity for the formulation of a certain specific fundamental right that raises itself from the general sphere of liberty.

4. Conclusion

The examples observed above should have illustrated the general tendency in the case-law of the Constitutional Court of the Czech Republic to act in a more activist manner towards both the legislature and the ordinary judiciary. The survey of such a tendency is not - of course – comprehensive at all, since it would require to examine the case-law more universally and at the same time in a greater detail; these examples should have been rather considered an initial and introductory presentation and preparation to a further in-depth study in this field.